Constitutionalising the EU Judicial System
Essays in Honour of Pernilla Lindh

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Subsidiarity as a Legal Concept

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NIL NOVI SUB SOLE: THERE IS NO NEW THING UNDER THE SUN
(ECCLESIASTES 1.9)

It is difficult to think of something new to write in honour of Pernilla Lindh whose conversation and companionship has given us all so much pleasure over the years. A further addition to the arcana of Union law hardly seems a fitting tribute to a remarkable lady whose legal skills are matched by a lively sense of humour and a warm heart. But something must nevertheless be written that is suitable for this volume of essays.

The contribution that follows is a personal reflection on the significance of subsidiarity as a legal concept in the light of Article 5 of the Treaty on European Union as amended by the Treaty of Lisbon. Is subsidiarity a principle of limited (though important) application relating only to the exercise of shared competences, or should we view it as a wider principle of good governance and public morality?

WHAT IS SUBSIDIARITY?

Subsidiarity formally entered the vocabulary of Community law with the Treaty of Maastricht, but it did not spring fully armed from the heads of the Treaty makers.

The underlying idea has a long history under a variety of different labels. As a principle of governance, it goes back at least as far as the Peace of Westphalia in 1648 with its assertion of exclusive state sovereignty (or at least the exclusive sovereignty of the monarch) and freedom of religion (or at least the freedom of the monarch to choose the religion of his subjects). In this form, subsidiarity is reflected in the international law principles of state sovereignty and non-interference.

Under the label of ‘federalism’, subsidiarity is a basic tenet of the United States Constitution. Such powers and competences as are not given to the authorities of the Federation remain with the States which are entitled to exercise them without federal interference.

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Subsidiarity can also be viewed as a common sense principle of good governance. In an essay originally composed in 1884, the Scottish constitutional thinker, James Bryce, explained how it can avoid political tensions:

Nothing contributes more to the smooth working of a central government and to the satisfaction of the people under it, than the habit of leaving to comparatively small local communities the settlement of as many questions as possible. The practice of local government and the love for it are not a centrifugal force, but rather tend to ease off any friction that may exist by giving harmless scope for independent action, and thus producing local contentment. It is only where there exist grievances fostering disruptive sentiments that the existence of local bodies with a pretty large sphere of activity need excite disquiet.1

In 1931 Pope Pius XI enunciated the principle as one of public morality. This is said to be the route through which it entered modern political discourse:

As history abundantly proves, it is true that on account of changed conditions many things which were done by small associations in former times cannot be done now save by large associations. Still, that most weighty principle, which cannot be set aside or changed, remains fixed and unshaken in social philosophy: just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.2

Whether one looks at it as principle of non-interference, a principle of federalism, a common sense principle of good governance or a principle of public morality, subsidiarity has now become part of the vocabulary of the EU embedded in the Treaties. How will it work as a legal concept?

SUBSIDIARITY IN THE MAASTRICHT TREATY

Subsidiarity in the Maastricht Treaty was essentially a restatement of Westphalian subsidiarity. Article 3b (later Article 5) EC stated, in a briefer form, the three principles of conferral, subsidiarity and proportionality that now appear in Article 5 TEU. Only subsidiarity was explicitly identified as a ‘principle’:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States

2 Pope Pius XI, Encyclical Quadragesimo Anno of 15 May 1931, para 79. The approach differs markedly from that of Innocent X whose portrait by Velasquez inspired a series of paintings by Francis Bacon. He condemned the Peace of Westphalia as nulla, irrita, invalida, iniqua, injusta, damnata, reprobata, inania, viribusque et effectu vacua – Bull Zelo Domus Dei of 26 November 1648.
and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

According to this formulation, the sole relevant actors were the Community on the one hand and the Member States on the other. At the time it seemed that this was no more than a defiant reassertion of the rights of the Member States as Herren der Verträge, defining the borderline between the respective competences of the Community and the Member States in areas of shared competence. There was no reference to any level of governance below that of the Member State, although there was a courtesy towards the citizen in the Preamble to the new Treaty on European Union (TEU):

RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity.

The Treaty of Amsterdam added a Protocol to the EC Treaty on the Application of the Principles of Subsidiarity and Proportionality. It contained a number of provisions that foreshadow the detailed procedures established in the Lisbon Treaty, but their focus was still on the Community/Member State relationship.

In the course of the European Convention, two major deficiencies were identified by Working Group I on the Principle of Subsidiarity:

First of all, with the notable exception of the possibility to obtain an opinion from the Court provided for in article 300 paragraph 6 EC, the current legal monitoring mechanisms only operate once a legal act has entered into force. Neither a preliminary ruling pursuant to article 234 EC nor a decision of annulment pursuant to article 230 EC can be obtained before a specific act causes legal effects. It is clear that the Court is less likely to overturn Community action that forms already part of the Acquis communautaire and is already being applied by the Courts and authorities of the Member States, than a legislative project without legal consequences at the moment of its examination. In the latter case the Court is more likely to take a detailed look at the factual evidence underlying the legislator’s claim that the objective of the act cannot be achieved at the level of the Member States.

Secondly, actions for annulment can only be brought by Member States, the Council, the Commission, the European Parliament (after the entry into force of the Treaty of Nice not only to protect its prerogatives), by the Court of Auditors and the ECB (both institutions only as far as the protection of their prerogatives is concerned) as well as by natural and legal persons, if the incriminated act is of direct and individual concern to them. National parliaments, the Committee of the Regions and Regions given legislative powers by the Constitutions of Member States, who are, in practice, primarily concerned by violations of the subsidiarity principle, are not entitled to institute legal action under the existing monitoring mechanisms. This is without any doubt another reason for the relative inactivity of the ECJ as far as subsidiarity questions are concerned.\footnote{Art 300 EC concerning proposed agreements with third countries and international organisations is replaced by Art 218 TFEU.}

\footnote{European-Convention.eu.int/docs/wd1/2140.pdf, 7-8.}
SUBSIDIARITY IN THE LISBON TREATY

The Working Group’s call for pre-legislative monitoring and recognition of the rights of national and regional legislatures explains the thinking behind the revised formulation of subsidiarity in Article 11 of the Constitutional Treaty and now in Article 5 TEU, as well as the governmental machinery provided for in Protocols No 1 on the Role of National Parliaments and No 2 on the Application of the Principles of Subsidiarity and Proportionality.

The new provisions in Article 5 and the Protocols should be read in light of the statements of values and aims in Articles 2 and 3. These include references to respect for the rights of minorities, pluralism, the Union’s rich cultural and linguistic diversity and Europe’s cultural heritage — aspects of national life that were stressed by the Bundesverfassungsgericht in its judgment on the Lisbon Treaty.5

The context in which subsidiarity is to be understood is now much wider than the dialogue between the Union and the Member States and includes non-political aspects of the everyday life of citizens. If not quite a principle of public morality, it is at least the basis of sound multi-level governance.

Article 5 TEU redefines the principles of conferral, subsidiarity and proportionality. Although the formulation of the three principles remains very similar to the Maastricht version, Article 5(1), following Article 1 of the Amsterdam Protocol, defines how they are related to each other. The principle of conferral is a limit (délimitation) of competence; subsidiarity and proportionality are limits to the use (exercice) of shared competence.

The distinction between the existence of a right and its exercise is already well known to EU lawyers, notably in the field of intellectual property law. Its significance in the present context suggests the sort of question that we should be asking where subsidiarity is in issue. The principle of conferral requires us to ask ‘Does the Union have competence?’ If the answer is that the Union has shared competence, subsidiarity poses the question ‘Does the Union need to exercise that competence?’ Finally proportionality asks ‘Does the Union need to exercise it in that way? Could it do so in a way that is less intrusive?’

Article 5(3) TEU adds a further important element to the definition of subsidiarity:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional or local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The regional or local dimension is further emphasised in Protocol No 2, Article 5 of which provides that:

Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal’s financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. [... ] Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved. (emphasis added)

Looking at these Treaty provisions as a whole, one can see that both the tone and the content are new. Subsidiarity is not just an assertion of the powers and prerogatives of the Member States vis-a-vis the union. There is now explicit recognition of sub-state entities as part of the constitutional order of the Union and economic operators and citizens are recognised as having a legitimate interest in the scope and effects of governmental action.

Under the former Treaties, democratic participation in the process of European government was exercised indirectly through the Heads of State or Government in the European Council or ministers in the Council and directly through the European Parliament. The role of national parliaments was limited to ‘scrutinis[ing] their governments in relation to the activities of the Union’, and regional parliaments were not recognised at all. But as the Working Group pointed out, it is national and regional parliaments that have the greatest interest in observance of the principle of subsidiarity or, to put it more bluntly, in resisting intrusion into areas of national, regional and local life that are properly their domain.

Now national parliaments must be directly informed about all Commission proposals (green and white papers and communications) and legislative proposals must contain ‘a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality’. Acting together, national parliaments can place a temporary block on legislation, and an independent role is given to their separate chambers, one of which (notably in Germany) may represent the organs of regional government. They in turn are given the role of consulting regional parliaments with legislative powers, and possibly the obligation to do so.

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5 Devrait in the French text; sollte in the German text.
7 See the preamble to Protocol No 1.
8 Protocol No 1, Art 1.
9 Protocol No 2, Art 5.
10 There is a minor but possibly significant difference between the different language texts of Art 6 of the Protocol. In English ‘[i]t is for [the Parliaments] to consult...’; in French ‘[i]l incombe [aux parlements] de consulter...’; in German ‘[d]abei obliegt es [die Parlamente] ... zu konsultieren’. The German text, unlike the English or French, appears to connote a positive obligation to consult.
These and other features of the new Treaty lead one to ask three questions:

- At what stage in the legislative process does compliance with the principle of subsidiarity become subject to judicial control?
- How is the Court to go about the task of determining whether the principle has been complied with?
- In a more general way, is subsidiarity to be seen, not merely as a principle of good governance and public morality, but as a legal norm pervading all aspects of Union activity?

JUDICIAL ENFORCEMENT UNDER PROTOCOLS NOS 1 AND 2

The machinery laid down in Protocols Nos 1 and 2 is clearly susceptible of judicial scrutiny and enforcement. The Protocols set out in some detail the procedure that must be followed at various stages of the legislative process and there is no reason why failure to comply with the prescribed steps of procedure should not be open to judicial review in the normal way under Article 263 TFEU as a breach of a Treaty provision.

However, Article 8 of Protocol No 2 goes further and extends the jurisdiction of the ECJ to

actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought, in accordance with the rules laid down in Article 263 [TFEU] by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof.

In addition, the Committee of the Regions may bring such an action where the act is one for which the TFEU provides that the Committee must be consulted. In this respect the Committee is placed in a position analogous to the former position of the European Parliament.

The wording of Article 8 raises a number of questions. The first, and perhaps the most important, is whether the new procedure can be invoked in the course of the legislative process or only when that process has resulted in a 'legislative act'? The answer is not obvious.

The expression 'infringement of the principle of subsidiarity by a legislative act' implies that the legislative process must be complete since it is only then that the act, rather than the process of its adoption, can infringe anything. Moreover, the wording of Article 8 echoes precisely the revised wording of Article 263 TFEU: 'The Court of Justice . . . shall review the legality of legislative acts . . . other than recommendations and opinions'. In principle, the right of action does not extend to acts of a preparatory character.\(^\text{12}\)

But there are several contra-indications. The wording of Article 5(3) implies that the test of subsidiarity is to be applied to 'proposed action' rather than a com-

pleted legislative act. That would respond to the first concern of the Working Group on Subsidiarity (quoted above), that legislative projects should be open to judicial scrutiny before they enter into force and become part of the EU law. If Article 8 applies only when the legislative process is complete, it does nothing to meet that concern.

In addition, the right of action conferred on the Member States by Article 8 must presumably be additional to the right to challenge legislative acts which they already enjoy as privileged applicants under Article 263 TFEU. It may seem odd to allow Member States both to take part in the legislative process in Council and, at the same time, to stymie its progress by raising an action in the ECJ claiming that the proposal under consideration does not comply with the principle of subsidiarity. But this objection is less obvious in the case of national parliaments.

In essence, the question is whether the procedure laid down by Protocols Nos 1 and 2 is designed to enable disputes about subsidiarity during the pre-legislative phase to be resolved through negotiation between the political institutions (and, where appropriate, national parliaments and the Committee of the Regions) or whether, as the Working Group wanted, questions of subsidiarity can be referred to the ECJ as the legislative process proceeds. There seems to be no obvious answer.

A subordinate question of interpretation arises in relation to the words ‘actions ... notified by [the Member States] in accordance with their legal order on behalf of their national Parliament or a chamber thereof’. Nowhere in the texts is there any provision for an action to be ‘notified’ to the Court by one party (even a privileged applicant) on behalf of another. It is not even clear who will be the party to the action – the Member State, the national parliament or the relevant chamber of the parliament? The idea seems all the more curious if one has in mind that the government of a Member State may have cast its vote in Council in favour of the legislative act that is being impugned by its own parliament. Having ‘notified’ the action on behalf of its parliament, will it be possible for the government of the same Member State to intervene to argue against its parliament? Again, there seems to be no obvious answer.

HOW SHOULD THE COURT APPROACH THE ISSUE OF SUBSIDIARITY?

Assuming that the procedural conundrums can be resolved, how is the ECJ to go about judging the question whether the principle of subsidiarity has been complied with? Much may depend on whether the Court interprets its jurisdiction under Article 8 as extending to review of pre-legislative proposals or only to post-legislative scrutiny.

On any view, the Court will need to ask itself a series of questions. The first group of questions, as suggested above, will be:

– Does the Union have competence? (conferral)
– If it is a shared competence, does the Union need to use it? (subsidiarity)
Does the Union need to use its competence in this way, or could it be used in a less intrusive way? (proportionality)

Having reached the second (subsidiarity) question, the wording of Article 5(2) TEU suggests three further questions:

- What is the 'objective' of the action?
- Can that objective be 'sufficiently' achieved by the Member States at central, regional or local level?
- Can it 'by reason of the scale or effects [of the measure] be better achieved at Union level?'

It is important to note that the second and third questions deal with separate issues. Even if the objective in question can be 'sufficiently' achieved by action at national, regional or local level, it must also be considered whether it can be 'better' achieved at Union level.

If the action (or proposed action) has passed all these hurdles, the enquiry will shift to proportionality. Fortunately, the Court has already developed an effective approach to proportionality:

- What is the objective?
- Is the action (or proposed action) necessary to achieve it?
- Does the measure go further than is necessary to achieve it?

The foregoing analysis of the questions to be asked and the tests to be applied suggests that the Court will be faced with problems of a new dimension. The expressions 'sufficiently achieved' and 'better achieved' imply a qualitative assessment involving an element of subjective judgment based on some comparison between the quality and efficiency of the expected result of action at different levels with a view to achieving the objective in question.

The comparison cannot be confined to the situation in a few Member States. In a Union of 27 or more Member States, the larger states, their regions or local authorities may have financial and other resources ‘sufficient’ to achieve the objective in question. Other Member States may not be so fortunate and action at Union level may be ‘better’ to enable the desired objective to be achieved Union-wide. Does that justify infringing the national, regional or local autonomy of the larger states? Presumably the answer will be yes, but it is hardly a question that the Court would be well equipped to answer.

How should the Court approach these questions? It seems unlikely that it will be faced with an action claiming that the Union has not acted, or has refused to act, in circumstances where it ought to have done so. The situation is far more likely to be the reverse, that the Union is accused of acting where subsidiarity would require restraint. In such a case, the Court will be able to focus on the quality and adequacy of the reasoning in the texts where the institutions of the Union seek to justify the action taken. At the pre-legislative stage, the relevant text would be the ‘detailed statement’ prospectively justifying the legislative act. Once the
post-legislative stage has been reached, the focus would shift to the preamble of the legislative act since this should explain why the legislation is necessary.

That approach would correspond reasonably well to what the Court does already in its scrutiny of legislative acts. A wider question is whether we should now regard subsidiarity as a legal norm permeating all aspects of Union life including, most controversially, action in the areas where the Union has exclusive competence.

DOES SUBSIDIARY NOW PERMEATE ALL ASPECTS OF UNION LIFE?

This article is being written in the midst of the crisis in the eurozone. The outcome is not foreseeable, but one idea seems to be uppermost if the crisis is to be resolved. That is the belief that the states of the eurozone must move towards a more integrated fiscal and economic policy. If that is correct, the corollary must be that those states would be less free than they are at present to make choices between different fiscal and economic options. Put another way, effective crisis management and the requirements of long-term stability are hardly compatible with adherence to subsidiarity (at least in the field of fiscal economics).

At the same time it is argued by others that the current crisis is the consequence of overreach at Union level. It is said that the so-called ‘Brussels élite’ have pressed ahead with grandiose projects of integration, disregarding the legitimate interests and concerns of the citizen at national, regional and local level. Subsidiarity as a moral principle of good governance is needed to restrain such ambitions and allow decision-making to occur ‘as closely as possible to the citizen’.

There is no obvious solution to the conflict between these two points of view. As the writer of Ecclesiastes said, there is nothing new under the sun. Such conflict is a perennial feature of democratic politics, as current events in the United States also show. It cannot be eliminated, but it can at least be managed. In that respect, what matters most is the attitude of mind with which the problems of the Union are approached.

It used to be said of the ECJ that its attitude was ‘in dubio pro Communitate’ (in doubt the interests of the Community should take precedence). Perhaps the motto should now be ‘in dubio pro subsidiaritate’ (when in doubt don’t interfere). This approach need not be confined to areas of shared competence. It is just as important in areas of exclusive competence that the Union institutions should ask themselves whether action is necessary and, if so, whether the action proposed is proportionate.

There are several indications in the new texts following Lisbon that this is the proper approach to adopt. Consider, for example, Article 4(2) TEU with its call upon the Union to respect the ‘fundamental structures [of the Member States], political and constitutional, inclusive of regional and local government’.

There is, however, a difference between adopting an attitude of mind and complying with a legal obligation. To what extent, apart from the machinery
prescribed by Protocols Nos 1 and 2, are the institutions of the Union obliged by the Treaties to comply with the principle of subsidiarity?

The Treaty wording is ambiguous. On the one hand, Article 5(1) TEU states without qualification that ‘[t]he use of Union competences is governed by the principles of subsidiarity and proportionality’. The two principles are placed on a footing of equality, as indeed they were in Article 1 of the Amsterdam Protocol.\textsuperscript{13} Proportionality is well established as a general principle of Community law. Why should subsidiarity not be also? This would imply that, even where the Union enjoys exclusive competence, it is bound, in the use of that competence, to observe both principles.

On the other hand, Article 5(3) begins ‘[u]nder the principle of subsidiarity, in areas which do not fall within its competence, the Union shall act only if . . .’ and Article 3 of the Amsterdam Protocol stated that this is the context in which it should be applied. This suggests that subsidiarity applies as a legal requirement only in areas of shared competence. Indeed, the idea that an objective can be sufficiently, or better, achieved at national, regional or local level hardly makes sense if the power to act belongs exclusively to the Union.

Nevertheless, the generality of Article 5(1) is compelling, and there is at least one indication elsewhere in the Treaty to suggest that subsidiarity will be a relevant consideration even where the Union has exclusive competence. Under Article 3(1)(b) TFEU, the Union has exclusive competence in ‘the establishing of the competition rules necessary for the functioning of the internal market’. Under Article 106(2) TFEU (part of the Rules on Competition):

Undertakings entrusted with the operation of services of general economic interest . . . shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

Article 14 TFEU (formerly Article 16 EC) includes the provision of services of general economic interest within the ‘shared values of the Union’. This is now given more precise content by Protocol No 26 on Services of General Interest, Article 1 of which provides that:

The shared values of the Union include in particular:

the essential and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;

the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;

a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.

\textsuperscript{13} ‘In exercising the powers conferred on it, each institution shall ensure that the principle of subsidiarity is complied with. It shall also ensure compliance with the principle of proportionality.’
Here we find a direct echo of the words of the Preamble and Articles 2 and 3 TEU (quoted above) forming part of the context in which Article 5 TEU is to be read. It seems reasonable to regard Protocol No 26 as an indication of the intention of the Treaty-makers to reaffirm that the Treaty is ultimately about the welfare of the people of Europe in the very diverse geographical, social and cultural situations in which they find themselves.

It is both a common sense principle of good governance and a principle of public morality that rules and policies devised for a continent should take account of where the inhabitants of that continent live, how they live and how they would like to live. Surely subsidiarity in that broad sense should be treated, like proportionality, as a general principle of law permeating all aspects of the life of the Union.